Supreme Court, U.S.
FILED

94-1347 FEB 6 1995

No. ~~OFFICE OF THE CLERK~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RAUL A. IPARRAGUIRRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether certiorari should be granted to resolve the conflict between the opinion below and the decision of this Court in *Ingram v. United States*, 360 U.S. 627 (1959) and decisions of the Fifth Circuit over whether drug conspiracy and attempt charges can be made out by piling inference upon inference?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. _____

RAUL A. IPARRAGUIRRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Raul A. Iparraguirre, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on November 8, 1994.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on November 8, 1994 is reproduced in the Petitioner's Appendix hereto at Pet. App. at 1.

The Order of the United States District Court, Southern District of Florida granting the Petitioner's Motion for Judgment of Acquittal Notwithstanding a Jury Verdict was entered on October 8, 1992. *See* Pet. App. at 34.

JURISDICTION

The Opinion of the court of Appeals for the Eleventh Circuit was entered on November 8, 1994. *See* Pet. App. at 1. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841(a)(1)

a. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

i) Course of Proceedings and Disposition Below

On March 20, 1990, a two-count indictment was returned in the United States

District Court for the Southern District of Florida, charging the Petitioner, Raul A. Iparraguirre, along with two co-defendants, with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846.

On April 25, 1990, an 11-count superseding indictment was returned. The Petitioner was charged in two counts of the eleven-count superseding indictment. Count IX charged nine defendants, including the Petitioner, with conspiring for three and one-half months to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Count X charged seven defendants, including the Petitioner, with attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846.

The Petitioner pled not guilty. The Petitioner stood trial with Co-defendant Patrick Bohne. At the conclusion of the Government's case and at the close of the evidence, the Petitioner moved for judgment of acquittal but these motions were denied.

On September 30, 1991, the jury found the Petitioner and Co-defendant Bohne guilty on Counts IX and X of the superseding indictment.

On October 7, 1991, the Petitioner filed a "Motion for Judgment of Acquittal Notwithstanding the Jury Verdict." In the motion, the Petitioner argued that the evidence at trial that for four minutes he drove a car containing sealed moving boxes which were found to contain cocaine was insufficient to establish that he knowingly conspired and attempted to possess with intent to distribute cocaine. On October

8, 1992 the district court entered a written Order granting the Petitioner's Motion for Judgment of Acquittal Notwithstanding the Verdict. The Government timely filed a notice of appeal from the district court's order.

On November 8, 1994, the United States Court of Appeals for the Eleventh Circuit reversed the district court's Order granting the Petitioner's Motion for Judgment of Acquittal, reinstated the jury's verdict of guilt as to the Petitioner and remanded the case for sentencing.

ii) Statement of Facts

At trial, the jury heard the following evidence relating to the Petitioner. Between January 12 and February 2, 1990, during an undercover investigation, agents of the Federal Bureau of Investigation ("FBI") and the United States Customs

Service ("Customs") seized approximately 2,700 kilograms of cocaine. After the cocaine had been transported to the United States, the FBI and Customs planned a controlled delivery.

On March 9, 1990, an undercover agent spoke to one of the Petitioner's co-defendants, Elio Hugo Rosales, who agreed to provide a van for the delivery of the cocaine. Subsequently, agents packed 540 kilograms of cocaine into "Beacon Company" moving boxes, labeled the boxes with the name "Salazar" and the Spanish words "bano" for bathroom and "cocina" for kitchen, sealed the boxes and loaded them into a van. Thereafter, an undercover agent telephoned Co-defendant Rosales to tell him where the van had been left.

On the morning of March 13, 1990, Petitioner's Co-defendant Patrick Bohne ("Bohne") was observed picking up the van

loaded with cocaine. Co-defendant Bohne drove the van to his residence, pulled into the garage and closed the door.

Petitioner testified that at approximately 3:00 p.m. on that same day, an individual named Ramone paged him on his work beeper. Petitioner related that he and his father own a towing business and as part of that business transported cars for a fee. According to the Petitioner, Ramone explained that he needed an automobile transported and that the Petitioner should proceed to a particular location where someone would pick him up.

At approximately 5:00 p.m. that evening, Bohne picked up the Petitioner at the corner of a Miami intersection. Bohne testified that he had been instructed to deliver the automobile to a person in a baseball cap. Bohne testified that he told the Petitioner that he would have to

wait there for a short time while he loaded some items into the car. According to Bohne, Petitioner then exited the vehicle and Bohne departed.

After loading the car with the sealed moving boxes containing cocaine, Bohne returned to the Miami intersection at approximately 5:48 p.m. and picked up the Petitioner. Bohne and the Petitioner drove around the block before Bohne exited the car and the Petitioner entered the driver's seat. Bohne testified that he was instructed specifically to tell the Petitioner that he was taking the car for a tune-up and not to tell the Petitioner what the sealed boxes contained. Bohne further testified that he did not tell the Petitioner what the sealed boxes contained.

According to an agent who followed the car, after Bohne exited the car, the

Petitioner glanced toward the agent's unmarked car as it passed. The Petitioner then turned left onto a four-lane road. The arresting officers testified that the Petitioner then drove 40 to 45 miles per hour for two blocks which the officers admitted is "not an excessive speed," made a sharp left-hand turn onto an intersecting street, and stopped. Before the Petitioner got out of the car, several agents approached, ordered him out of the car and advised him that he was under arrest. It was undisputed at trial that the Petitioner was only in the car with the contraband for approximately four minutes and was accompanied by Co-defendant Bohne for two of those four minutes.

Agents retrieved several sealed "Beacon Company" moving boxes from the back seat and trunk of the car. The sealed boxes were labeled with the name "Salazar"

and the Spanish words for "kitchen" and "bathroom." The sealed boxes did not emit any odor nor otherwise indicate they contained anything other than what they purported to contain. However, the sealed boxes, in fact, contained approximately 195 kilograms of cocaine. The agents also found a cellular phone.

After reading the Petitioner his rights and announcing to the Petitioner what the boxes contained, the arresting agents asked the Petitioner if he knew what was going on. The Petitioner responded, "Yeah, sure." He also stated that he did not know what was in the boxes before, but "I guess I do now." The Petitioner also indicated that he did not know Co-defendant Bohne.

The Petitioner explained to the agents that he was paged on his beeper and someone he did not know asked him to meet

someone else to pick up a car. He showed the agent a business card from his towing company. The Petitioner stated that he had been told to drive around until someone called and instructed him where to take the vehicle.

While agents were driving the car to Co-defendant Bohne's house, the cellular phone rang but the caller hung up when the agent answered. The Petitioner then explained that he had given his wife the number so she could call. The Petitioner's wife testified it was she who had called. She did not recognize the voice so she hung up.

At trial, the Petitioner also testified that he was told he was taking the car for a tune-up. The Petitioner further testified that he only met Co-defendant Bohne once.

Although the Government's undercover investigation had taken more than a year and involved many targets, agents testified at trial that they had never seen or heard of the Petitioner before the day of his arrest. Indeed, although the scope and duration of the Government's investigation was vast, there was no evidence that the Petitioner had any contact with, or knowledge of, the known conspirators before three o'clock on the afternoon he was arrested -- just three hours before his arrest.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE OPINION BELOW AND THE DECISION OF THIS COURT IN *INGRAM V. UNITED STATES*, 360 U.S. 672 (1959) AND DECISIONS OF THE FIFTH CIRCUIT OVER WHETHER DRUG CONSPIRACY AND ATTEMPT CHARGES CAN BE MADE OUT BY PILING INFERENCE UPON INFERENCE.

In the opinion below, the Eleventh Circuit held that because the Petitioner had sole possession of a car loaded with sealed boxes containing a large of amount of cocaine for two minutes, an inference could be drawn that he knew the sealed boxes contained cocaine and this inference was supported by other circumstantial evidence, including that, the Petitioner drove the car at 40 to 45 miles per hour for two blocks and made a sharp left turn; the Petitioner and Co-defendant Bohne circled around the block before Bohne turned the car over to Petitioner; Bohne

entrusted a cellular telephone to the Petitioner when he delivered the car; the Petitioner did not mention that he was taking the car for a "tune-up" until Bohne testified to that at trial; and the Petitioner and Bohne differed in their testimony as to whether Bohne had picked up the Petitioner once or twice on the day in question.

Thus, in reaching its decision, the Eleventh Circuit piled inference upon inference and ignored the district court's finding that the evidence against the Petitioner was minimal. Indeed, the district court noted in her Order granting Judgment of Acquittal Notwithstanding the Verdict:

> [T]he Court believes that the totality of circumstances surrounding Iparraguirre's possession severely undermine the presumption that he must have known that the car contained contraband and that therefore smugglers would not have entrusted

> it to him had he not been a conspirator. The evidence is clear that Iparraguirre was only in the car with the contraband for approximately four minutes—and was accompanied by Bohne for two of those four minutes. Moreover, there was no evidence that Iparraguirre had any contact with, or knowledge of, the known conspirators before three o'clock that afternoon, three hours before he was arrested. This is significant given the scope and duration of the government's investigation. Furthermore, the contraband was contained in sealed "Beacon Company" moving boxes labeled with the words "Salizar" and the Spanish words for bathroom or kitchen. The boxes did not emit any odor nor otherwise indicate that they contained anything than what they purported to contain.
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> * * *
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> Furthermore, any inference that the conspirators were reluctant to risk the property is somewhat undermined by the fact they previously left a van full of cocaine unattended for several hours. Regardless . . . the government produced no evidence that Iparraguirre was actually in exclusive control of the contraband and not being observed by those who engaged him.

See Pet. App. at 47-49.

By piling inference upon inference, the Eleventh Circuit ignored this Court's admonition that "charges of conspiracy are not to be made out by piling inference upon inference." *Ingram v. United States*, 360 U.S. 672, 680 (1959), quoting *Direct Sales Co. v. United States*, 319 U.S. 703-711 (1943) In *Ingram*, the evidence showed that the defendants engaged with numerous others in a closely organized, large-scale numbers game, illegal under Georgia law, but not violative of any Federal statute. The entrepreneurs of the business did not pay the required federal taxes on their ill-gotten gains. The convictions on tax conspiracy charges of the defendants who were minor clerical functionaries of the gambling operation and who did not owe any federal taxes were reversed by the Supreme Court. This Court held that, while there was sufficient evidence to convict them of

a conspiracy to violate Georgia gambling law, there was no direct evidence that they knew their superiors owed federal waging taxes. Furthermore, circumstantial evidence that they were intimately connected with the operation of the lottery, they cooperated in conducting a lottery secretly and they knew that the lottery was conducted at a profit was not sufficient evidence to establish that they knew of their superior's tax liability. This Court noted:

> Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. This, because charges of conspiracy are not to be made out by piling inference upon inference . . . .

360 U.S. at 680, quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). By piling inference upon inference to uphold the Petitioner's convic-

tions, the Eleventh Circuit disregarded this Court's admonition in *Ingram*.

Furthermore, the Eleventh Circuit's reliance on the Petitioner's possession of the car containing the sealed boxes of cocaine for a few minutes as the controlling factor justifying an inference that the Petitioner knowingly participated in the crime was erroneous and conflicts with decisions of the Fifth Circuit. The Fifth Circuit has held that a defendant's exclusive control over a vehicle containing drugs should not be relied upon as the sole or controlling factor which justifies an inference that the defendant knowingly participated in a drug operation. *United States v. Littrell*, 574 F.2d 828 (5th Cir. 1978); *United States v. Olivier-Becerril*, 861 F.2d 424 (5th Cir. 1988).

In *Littrell, supra,* co-defendant Davi met with an agent of the Drug Enforcement

Administration at a hair-styling shop and agreed to sell cocaine to the agent. Davi then placed a phone call and told an unidentified party to "go ahead and bring it." Thereafter, defendant Littrell drove to the hairstyling shop and parked at which time Davi told the agents that "the man is here." Defendant Littrell got out of the car, had a brief conversation with Davi outside of the shop and went into a nearby bar. Davi then approached the passenger side of the car, reached into the glove box and removed a paper sack containing 17 ounces of cocaine. The Fifth Circuit reversed defendant Littrell's convictions of possession of cocaine with intent to distribute, distribution of cocaine and conspiracy citing this Court's warning in *Ingram, supra*, that "charges of conspiracy are not to be made out by piling inference upon infer-

ence". 574 F.2d at 834. In reversing Defendant Littrell's convictions, the Fifth Circuit rejected the Government's argument that Defendant Littrell's exclusive possession of the car containing the cocaine justified an inference that Defendant Littrell knowingly participated in the drug operation because a drug "boss" would not entrust delivery of several thousand dollars worth of cocaine to someone who did not know of its presence or did not know of the drug operation itself. The Fifth Circuit held that the Government's argument was flawed:

> [W]e can hardly presume that Littrell knew of the drug operation; indeed, it might be an asset for such a courier to be uninformed about the nature of his delivery, since he would have no reason to be nervous or apprehensive about a task he believed to be perfectly legitimate. Thus, Littrell may simply have been an unknowing "runner" in the delivery process.

574 F.2d at 833.

Similarly, in *United States v. Olivier-Becerril*, 861 F.2d 424 (5th Cir. 1988), the Fifth Circuit held that where a defendant had sole control of a vehicle in which drugs were hidden, the defendant's sole control of the vehicle, standing alone, did not justify an inference that the defendant knew controlled substances were in the vehicle.

Additionally, it is noteworthy that, in the case *sub judice*, the Eleventh Circuit's holding that a defendant's possession of a car containing large amounts of contraband is a controlling factor justifying an inference that the defendant knowingly participated in a drug operation ignores Eleventh Circuit precedent. *See United States v. Vidal-Hungria*, 794 F.2d 1503, 1513 (11th Cir. 1986) (reversing defendant's convictions of conspiracy to possess with intent to distribute marijua-

na while aboard a vessel subject to the jurisdiction of the United States and possession with intent to distribute marijuana while aboard a vessel subject to the jurisdiction of the United States; a defendant's presence on a vessel in which a large amount of drugs are concealed "is not a controlling factor" justifying an inference beyond a reasonable doubt that the defendant knowingly and intentionally participated in the drug crimes).

Because the Eleventh Circuit's decision in the case *sub judice* conflicts with this Court's decision in *Ingram*, *supra*, and with cases from the Fifth Circuit and because similar prosecutions based primarily on a defendant's control of a vehicle or vessel containing drugs are certain to occur in the future, the Petition for a Writ of Certiorari should be granted.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

MJS271

APPENDIX

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

PATRICK ALEXANDER BOHNE,
Defendant-Appellant
No. 92-4977

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

RAUL A. IPARRAGUIRRE,
Defendant-Appellee
No. 92-5062

United States Court of Appeals
Eleventh Circuit
November 8, 1994

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG, Senior District Judge.*

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Patrick Bohne and Raul Iparraguirre were tried and found guilty by a jury of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), and attempt to possess with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and Title 18, United States Code, Section 2. The district court entered a J.N.O.V. as to Iparraguirre. The Government appeals. Bohne appeals his conviction.

BOHNE'S APPEAL

Appellant Bohne raises two issues on appeal. Bohne contends that he was deprived of a fair trial by being forced to appear before the jury in prison-issue

khakis[1] despite Bohne's request to change clothes.

The record reflects the district court specifically noted that Bohne was dressed in a brown quilted jacket, khaki pants, light beige dress shirt without a tie, and brown brogan shoes. The district court expressly found that Appellant Bohne was "certainly not in any type of prison garb at this time that I can see." Later in the trial, Bohne changed into a blue blazer and white shirt.

Bohne does not contend that the prison-issue clothing he wore initially before the jury bore any visible marks identifying him as an inmate. Rather, he asserts that, "in Miami, Florida . . . it has been instilled in the collective pub-

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[1] Bohne also asserts that he was deprived of his right to a fair trial by virtue of the district court's comments during the trial. Finding no merit in this issue, discussion is not warranted.

lic consciousness that khakis are the uniform of federal prisoners."

In support of his claim, Bohne relies upon *Estelle v. Williams*, 425 U.S. 505, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), as well as our decision in *United States v. Harris*, 703 F.2d 508 (11th Cir. 1983). In *Estelle*, the United States Supreme Court held that the state cannot, consistent with the fourteenth amendment, compel an accused to stand trial before a jury while dressed in "identifiable" prison clothes.[2] 425 U.S. at 512. In *Harris*, the defendant was clothed in a shirt and pants that were clearly marked with words identifying the clothes as prison-issue. On those facts, this Court found that the

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[2] The Court held in *Estelle* that the defendant's failure to make an objection to the trial court as to being tried in clothes that were "distinctively marked as prison issue," 425 U.S. at 502, was sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Harris defendant's clothing communicated to the jury that the defendant was presently in custody, thus infringing his right to a presumption of innocence.

Unlike the defendants in *Estelle* and *Harris*, whose clothes were readily identifiable as prison-issue, Appellant Bohne wore clothing devoid of any letters or numbers that would designate the clothing as prison garb. There is no support in this record for Bohne's contention that his clothing was identifiable as prison attire, or for the inference that the jury would have recognized his clothing as prison-issue and, therefore, realized that Bohne was incarcerated. Accordingly, Bohne has failed to establish that he was denied a fair trial, and we decline to reverse his conviction on this basis.

GOVERNMENT'S APPEAL OF THE J.O.A.

Standard of Review

When a jury verdict of guilty is set aside by the district court by granting a judgment of acquittal based on insufficiency of the evidence, the district court's decision is "entitled to no deference." *United States v. Battle*, 892 F.2d 992, 998 (11th Cir. 1990) (quoting *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988)). We examine the evidence in the light most favorable to the Government, resolving all credibility choices and drawing all reasonable inferences in support of the jury's verdict. *Battle*, 892 F.2d 999. Under our standard of review,

> [i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt

> beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

Battle, 892 F.2d at 998 (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) (footnote omitted), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct 2398, 76 L.Ed.2d 638 (1983)).

When a defendant has chosen to present a defense, he incurs the risk that his evidence may bolster the case of the Government, rather than aid his own. *United States v. Contreras*, 667 F.2d 976, 980 (11th Cir.), *cert. denied*, 459 U.S. 849, 103 S.Ct. 74 L.Ed.2d 97 (1982). Similarly, a jury may infer guilty knowledge based upon a defendant's implausible explanation of his actions at trial. *Id.*; *United States v. Bennet*, 848 F.2d 1134, 1139 (11th Cir. 1988).

The Evidence at Trial

At trial, the jury heard the following evidence. Between January 12 and February 2, 1990, during an undercover investigation, Federal Bureau of Investigation ("FBI") Agents and the United States Customs Service ("Customs") seized approximately 2,700 kilograms of cocaine. After the cocaine had been transported to the United States, the FBI and Customs planned a controlled delivery. An undercover agent spoke to one of the Defendants in this case, Elio Hugo Rosales, who agreed to provide a van for the delivery of the cocaine. Subsequently, agents packed the van with 540 kilograms of cocaine, and the undercover agent telephoned Rosales to tell him where the van had been left. On the morning of March 13, 1990, Appellant Bohne was observed picking up

the van loaded with cocaine. Bohne drove the van to his residence, pulled into the garage and closed the door. At 2:37 p.m., Bohne left the residence and unsuccessfully tried to start the van. Bohne then walked to a Shell gas station on Ludlum Road. At 3:13 p.m., Bohne returned with two gallon cans of gasoline, put the gasoline in the van, started it and drove back to the Shell station.

After Bohne arrived at the Shell station, Bohne used the public telephone and then entered the convenience store at the station. While Bohne was in the store, one of the agents walked by the van and saw that the boxes of cocaine had been removed. Several minutes later, Bohne got back in the van, drove to a nearby shopping center and parked. During the next thirty minutes, Bohne used three different

public telephones at the shopping center. At 4:14 p.m., Bohne entered a brown Oldsmobile that was parked at the shopping center and drove away, leaving the van behind.

At 4:24 p.m., Bohne returned home. Approximately 30 minutes later, Bohne left the residence, entered the Oldsmobile and drove north on Ludlum Road.

At 5:18 p.m., Bohne returned home, parked the Oldsmobile in the garage and closed the door. At 5:43 p.m., Bohne opened the garage door and drove away, again heading north on Ludlum Road. At the intersection of Ludlum Road and 12th Street, Bohne picked up a man later identified as Iparraguirre. The two then "squared the block" and stopped, facing west on 12th Street at the intersection of Ludlum Road.

Both men got out of the Oldsmobile, walked to the back of the car, spoke for several seconds and shook hands. Iparraguirre then got into the driver's side of the car as Bohne walked around to the passenger's side and leaned in the window. Several seconds later, Iparraguirre glanced back over his right shoulder as an unmarked surveillance vehicle passed. After it passed, he turned left onto Ludlum Road heading south.

As Iparraguirre turned onto Ludlum Road, he rapidly accelerated. At the same time, FBI Special Agent Richard Massey followed him in a second unmarked surveillance vehicle. During the next two blocks, with Massey directly behind him, Iparraguirre accelerated to approximately 40 to 45 miles per hour. He then veered left onto 14th Street, a narrow alleyway

that bends sharply to the right approximately one-half block from Ludlum Road, and began heading east. Special Agent Massey testified that, based on his experience, Iparraguirre was driving in an evasive manner.

After turning onto 14th Street, Iparraguirre accelerated down the street to approximately 25 to 30 miles per hour. As he approached the sharp bend in the street, he slowed down, enabling Massey to close the short distance between the two cars. Once Iparraguirre had turned the bend, he stopped against a tall chain-link fence. Iparraguirre then opened his car door in the direction of a tall hedge on the left side of the road. Before he got out of the car, several agents approached, ordered him out of the car and advised him that he was under arrest.

The agents then searched the Oldsmobile and found a cellular telephone and a number of boxes piled in the back seat and trunk. Inside the sealed boxes, agents found approximately 194 kilograms of cocaine; the agents also found a bag containing several more kilograms in the trunk of the car. The street value of the cocaine was approximately $3 million.

Once the agents had opened the boxes, they asked Iparraguirre if he knew what was going on. He stated "Yeah, sure." He claimed he did not know what was in the boxes, but "guessed he did now." Iparraguirre told the agents he was taking the car to a friend. He also stated that he received the Oldsmobile and cellular telephone from a person he did not know. Iparraguirre then stated that he was paged on his beeper by a man he did not know and

told to pick up a car at a certain location and to drive it around until he received a call on the cellular telephone. Iparraguirre claimed the person had identified him by the baseball cap he had been wearing.

Subsequently, the cellular telephone rang and was answered by one of the agents. The agent stated the caller had hung up. Iparraguirre volunteered that he had given the cellular telephone number to his wife.

Shortly thereafter, Iparraguirre was again questioned about his acquisition of the Oldsmobile containing the cocaine. Iparraguirre displayed his business card and indicated he was in the towing business. Iparraguirre then stated he had received a beep from someone he did not know, asking him to go to the Ludlum Road

area to pick up a car. Once he received the car and cellular telephone, he was supposed to drive around until he received a call from another unknown person who would tell him where to take the car. Finally, Iparraguirre repeated that he did not know the person who had given him the car and telephone and that he had worn the baseball hat so the person would recognize him.

Co-defendant Bohne testified that his boss had instructed Bohne to load as many kilograms of cocaine into his Oldsmobile as he could and to deliver the car to an individual who would be wearing a baseball cap and waiting at Ludlum Road and S.W. 8th Street. The boss told Bohne to re-tape the boxes so none of the cocaine was visible, to load the boxes into the trunk and back seat of the car, and to tell the

individual that this was the car for the "tune-up."

Bohne testified that, before loading the car, he drove to a shopping center at the intersection of S.W. 8th Street and Ludlum Road and picked up Iparraguirre. Bohne and Iparraguirre drove around for a short time and talked. Iparraguirre then got out of the car and waited while Bohne returned to his residence to retrieve the cocaine.

After Bohne had piled boxes into the back seat and trunk of the car, he drove back to Ludlum Road and S.W. 12th Street and picked up Iparraguirre. The two squared the block, came to a stop and got out of the car. Before leaving, Bohne told Iparraguirre that this was the car for the "tune-up" and to make sure it was a complete tune-up. Iparraguirre then got

back in the car and asked for and received the registration. Bohne declined Iparraguirre's offer of a ride home.

Iparraguirre testified in his own defense that he did not know that there was cocaine in the car he was driving when he was arrested and called witnesses to corroborate his claim. Iparraguirre's wife testified that Iparraguirre and his father owned a towing business. She explained that, as part of the business, her husband and his father would pick up cars and move them.

Mrs. Iparraguirre testified that on March 13, 1990, she and her husband were shopping when his beeper went off. In response to the beep, he went to a public telephone and made a call. Iparraguirre then told her that he had a job moving a car and gave her the telephone number that

he had received on his beeper. Before leaving to pick up the car, Iparraguirre drove his wife home.

Later that day, Mrs. Iparraguirre called the telephone number her husband had given her in order to say "hello." When someone other than her husband answered and asked who she was, she asked the identity of the speaker. When she did not recognize the voice, she hung up.

Iparraguirre, a 25-year old United States citizen, testified that he and his father were in the towing business. As part of that business, he moved cars for a fee. Like his wife, he also acknowledged that his business card does not mention this aspect of his business and that he does not advertise this service.

Iparraguirre explained that on March 13, 1990, he was shopping and received a

beep. When he returned the call, he spoke to an individual named "Ramon" whom he did not know. According to Iparraguirre, Ramon stated that he previously had been towed by Iparraguirre and needed him to move a car from 12th Street, but was not yet sure where it would be going. Ramon stated that there would be a telephone in the car, and that he would call Iparraguirre on that telephone to tell him where to take the car. Ramon explained that the number he had entered in Iparraguirre's beeper was the number of the cellular telephone.

Later that day, Iparraguirre drove to the intersection of S.W. 12th Street and Ludlum Road to pick up the car. Soon thereafter, Iparraguirre was picked up by Bohne and the two drove around the block. Bohne then got out of the car, gave the

registration to Iparraguirre and told him this was the car for the "tune-up." Bohne did not tell Iparraguirre where to take the car.

As he drove away, Iparraguirre initially turned left on Ludlum Road and went a short distance. He then made a left turn onto 14th Street because he "had to head down east." Iparraguirre testified that, as he made the turn, he saw the agents' blue light, pulled over near a fence and got the registration ready. At that point, the agents identified themselves and placed him under arrest and advised him of his rights.

During the ensuing minutes, Iparraguirre overheard agents state that there was cocaine in the boxes in the car. Iparraguirre claimed that, prior to that time, no one had told him what was in the

boxes. He also had not asked what was in the boxes, nor had he opened them. Consequently, when the agents asked him if he knew what was in the boxes, he said "No, but now I do."

Iparraguirre explained that while the agents were transporting him to another location, the cellular telephone they had recovered from the Oldsmobile rang. Iparraguirre claimed that after the caller had hung up, the agents asked him who had called. Iparraguirre responded that he had given the number to his wife and that she could have been the caller. He also testified that it sounded like her voice on the telephone.

Iparraguirre testified that it was unusual for him to pick up a car at an intersection, as opposed to a business or residence. He also testified that it was

unusual for a customer to give him a cellular phone, but that it was not unusual to find boxes stacked in the back seat. Iparraguirre testified that he believed he was taking the car for a tune-up and did not know that he was transporting cocaine.

Finally, contrary to the testimony of Bohne, Iparraguirre testified that he had only been picked up once on March 13, 1990. Iparraguirre testified that he was not the person whom the surveillance agents had seen Bohne pick up thirty minutes before the car was loaded with cocaine.

The Government called three witnesses on rebuttal, one of whom had testimony relevant to the case against Iparraguirre. Special Agent Zogorski, who had interviewed Iparraguirre after his arrest, testified that Iparraguirre had not said

that he had to "go east" after he received the Oldsmobile from Bohne, and that Iparraguirre had never said that he was taking the car for a tune-up. According to Agent Zogorski's testimony, Iparraguirre stated he was supposed to drive around until he received a telephone call from someone who would tell him where to deliver the car.

Elements of the Offenses

To obtain a conviction for conspiracy to possess cocaine with the intent to distribute, the Government must prove beyond a reasonable doubt that a conspiracy to possess cocaine with the intent to distribute existed between two or more persons, that the accused knew of the conspiracy, and that the accused, with this knowledge, voluntarily became a part of the conspiracy. *United States v.*

Iglesias, 915 F.2d 1524 (11th Cir. 1990). "Close association with a co-conspirator or mere presence at the scene of the crime is insufficient evidence of knowing participation in a conspiracy. However, direct evidence of the elements of a conspiracy is not required." *Id.* at 1527 (quoting *United States v. Weaver*, 905 F.2d 1466, 1479 (11th Cir. 1990), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed.2d 1058 (1991), and *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983)). "Presence is a material and probative factor that the jury may consider in reaching its verdict." *Id.* (citing *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir.), *cert. denied*, 469 U.S. 937, 105 S.Ct. 340, 83 L.Ed.2d 275 (1984)). "The government may prove that a defendant knowingly participated in a conspiracy

through proof of surrounding circumstances such as acts committed by the defendant that furthered the purpose of the conspiracy." *Id.*

To prove attempt to possess with intent to distribute, the Government must demonstrate beyond a reasonable doubt that the defendant knowingly had attempted to possess cocaine and that he intended to distribute it. *United States v. Adams*, 799 F.2d 665 (11th Cir. 1986), *cert. denied*, 481 U.S. 1070, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987). Intent to distribute may be inferred from the quantity of cocaine seized. *Iglesias*, 914 F.2d at 1528 (citing *United States v. Montes-Cardenas*, 746 F.2d 771, 778-79 (11th Cir. 1984)).

The J.O.A.

In its written judgment of acquittal, the district court reviewed and distin-

guished decisions in which this Court "permitted a jury to infer knowledge and intent from the amount of cocaine involved," and addressed what it perceived to be the deficiencies in the Government's case:

> [T]he inference that the conspirators would not have entrusted the contraband to Iparraguirre is significantly diminished because the danger that he would realize he was carrying three million dollars worth of cocaine was minimal. Furthermore, any inference that the conspirators were reluctant to risk the property is somewhat undermined by the fact that they previously left a van full of cocaine unattended for several hours. Regardless, unlike [*United States v. Quintero*, 848 F.2d 154 (11th Cir. 1988)], the Government produced no evidence that Iparraguirre was actually in exclusive control of the contraband and was not being observed by those who engaged him. Accordingly, it is clear, as it was in [*United States v. Vidal-Hungria*, 794 F.2d 1503 (11th Cir. 1986)], that the quantity of drugs is not controlling in light of the totali-

ty of the circumstances and that, therefore, the Government must demonstrate Iparraguirre's knowing participation through evidence other than his mere presence in the car containing the cocaine.

. . .

[N]one of Iparraguirre's actions permit a reasonable jury to infer beyond a reasonable doubt that he knowingly participated in a conspiracy or intended to possess cocaine. Unlike the cases cited, there was no evidence that Iparraguirre had any substantial connection to the known conspirators or the cocaine. Indeed, the evidence of Iparraguirre's involvement with the cocaine rests on his actions over a period of only four minutes. Nor was there evidence. . . of Iparraguirre's role in the conspiracy. In fact, the only evidence on this point was that Iparraguirre was not informed that the boxes contained cocaine. Finally, Iparraguirre had no prior conviction from which the jury could infer his intent and knowledge.

Although taken in the light most favorable to the Government, Iparraguirre's driving, statements, and testimony, as well as the call to the mobile

> phone could permit an inference that Iparraguirre was a knowing participant in the conspiracy, these facts when compared to precedent do not support an inference of guilt beyond a reasonable doubt. Thus, because Iparraguirre's minimal nexus to the conspirators and contraband does not itself, *nor in conjunction with other evidence*, justify an inference beyond a reasonable doubt that he knowingly participated in these crimes, there is insufficient evidence to support his conviction.

(Emphasis in original).

The Government contends that the district court: (1) failed to view the evidence in the light most favorable to the Government; (2) omitted from its recitation of the facts and thus failed to consider significant aspects of the evidence, including critical details of Iparraguirre's conduct, thereby casting Iparraguirre's actions in an inaccurate light; (3) failed to give appropriate weight to the Government's evidence con-

cerning Iparraguirre's use of a beeper and cellular telephone, evasive driving, attempted flight, demeanor at the time of his arrest, and the telephone call the agents received on the cellular phone after Iparraguirre's arrest; and (4) unjustifiably accepted as true substantial portions of Iparraguirre's testimony, including his explanation for his actions on the day of his arrest.

Iparraguirre maintains that the Government did not prove his knowing participation through evidence other than his mere presence in the car containing the cocaine. Iparraguirre asserts that there is no evidence that he had any contact with, or knowledge of, the alleged co-conspirators until three hours before his arrest. Iparraguirre also contends that, because the conspirators had previously

left a van full of cocaine unattended for several hours, the inference that they were reluctant to risk the property by entrusting it to an "outsider" was undermined.

Analysis

Taken in the light most favorable to the Government, we conclude that the jury could reasonably determine that the evidence establishes beyond a reasonable doubt that Iparraguirre knew of the conspiracy and that, with knowledge, he voluntarily joined the conspiracy. Iparraguirre's credibility was for the jury to determine; it was the jury's prerogative to disbelieve some or all of his testimony. *United States v. Herrera*, 931 F.2d 761 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1588, 118 L.Ed.2d 306 (1992). The jury could reasonably reject as incredible

the notion that a prudent drug smuggler would allow a person he did not know to drive around in a car loaded with boxes—some of which were clearly visible in the back seat of the automobile—which contained cocaine valued at $3 million, risking discovery of the contents of the boxes by the driver, the movement of the car to an unknown location, or the theft of the cocaine or the notification to law enforcement. *Cf. United States v. Quintero*, 848 F.2d 154 (11th Cir. 1988); *United States v. Cruz-Valdez*, 773 F.2d 1541 (11th Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986). Contrary to the argument of Iparraguirre, who asserts that the evidence that the van was left loaded with cocaine in a public parking lot for several hours undermined the inference that the conspirators would not risk the property

by entrusting it to a stranger, it is clear that leaving a locked van containing boxes of cocaine during daylight hours at a public parking lot is vastly different from entrusting total control of a car containing boxes of cocaine to an unknowing stranger.

From the evidence that Bohne gave Iparraguirre the car containing the cocaine and that Iparraguirre alone was driving it when he was arrested, the jury could reasonably have inferred that Iparraguirre had exclusive possession and control over $3 million in cocaine. The jury could have reasonably found that Iparraguirre's actions in driving the vehicle loaded with cocaine were in furtherance of the conspiracy, demonstrating Iparraguirre's voluntary participation in the conspiracy. This conclusion has sup-

port in the testimony that Iparraguirre's driving was "evasive" as he was being followed by Government agents.

Further, the jury could reasonably have determined that other evidence of Iparraguirre's conduct supported the conclusion that Iparraguirre was a knowing and voluntary participant in the conspiracy, including the following: Iparraguirre and Bohne had circled around the block before Bohne turned the car over to Iparraguirre; Bohne had entrusted a cellular telephone to Iparraguirre when he delivered the car; Iparraguirre did not mention that he was taking the car for a "tune-up" until after Bohne testified to that at trial; and Iparraguirre and Bohne gave contradictory testimony concerning whether Bohne had picked up Iparraguirre once or twice on the day in question.

In addition, the jury could have reasonably disbelieved Iparraguirre's testimony that he was taking the car for a "tune-up" late in the afternoon (nearly 6:00 p.m.) to an unknown destination, for an unknown client, without any evidence of an arrangement for pay for services rendered.

Because we find that the totality of circumstances are sufficient to establish guilt beyond a reasonable doubt in the minds of reasonable jurors, we conclude that the judgment of acquittal must be reversed and the case remanded for sentencing.

CONCLUSION

For the reasons expressed, Bohne's conviction is AFFIRMED; the district court's order granting Iparraguirre's motion for judgment of acquittal is RE-

VERSED, the jury's verdict of guilt as to Iparraguirre is reinstated, and the case is REMANDED for sentencing.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAUL IPARRAGUIRRE,

Defendant.

No. 90-0196-CR-NESBITT

United States District Court for
the Southern District of Florida

October 8, 1992

Before LENORE C. NESBITT,
United States District Judge

**ORDER GRANTING JUDGMENT
OF ACQUITTAL NONWITHSDANDING
THE VERDICT**

This cause comes to the Court upon the Defendant, Raul Iparraguirre's ("Iparraguirre") Motion for Judgment of Acquittal Notwithstanding the Verdict. After careful consideration of Iparraguirre's motion, the Government's response and the evidence at trial it is ORDERED and ADJUDGED as follows:

At trial the following evidence was introduced relating to Mr. Iparraguirre. Iparraguirre testified that at approximately 3:00 p.m., on the day he was arrested, an individual named Ramone paged him on his work beeper. Iparraguirre related that he worked in the towing business and as part of that business transported cars for a fee. According to Iparraguirre, Ramone explained that he needed an automobile transported and that Iparraguirre should proceed to a particular location where someone would pick him up. At approximately 5:00 p.m. that evening, Defendant Bohne ("Bohne") picked up Iparraguirre at the corner of Tamiami Trail and Ludlum Road and drove around for a short time. Bohne testified that he told Iparraguirre that he would have to wait there for a short time while Bohne

loaded some items into the car. Iparraguirre then exited the vehicle and Bohne departed.

After loading the car with boxes of cocaine, Bohne returned to Ludlum and 12th Street at approximately 5:48 p.m. and again picked up Iparraguirre. Bohne and Iparraguirre drove around the block before Bohne exited the car and Iparraguirre entered the driver's seat. Bohne testified that he was instructed specifically to tell Iparraguirre he was taking the car for a tune-up and not to tell Iparraguirre what the boxes contained. Bohne further testified that he in fact did not tell Iparraguirre what the boxes contained.

The Government maintains that as Iparraguirre sat in the driver's seat, he saw one surveillance vehicle and "glanced back over his right shoulder--away from

his side and rear view mirrors-and noticed a second unmarked FBI surveillance vehicle coming towards him on 12th Street." The arresting officers related that Iparraguirre then drove in an "evasive manner" by: accelerating to 40 miles per hour within two blocks; failing to yield immediately to the agent's blue light; making a sharp left hand turn from the center lane; and stopping and opening his door against a chain-link fence and tall hedge.

After reading Iparraguirre his rights and announcing what the boxes contained, the arresting agents asked Iparraguirre if he knew what was going on. Iparraguirre responded "Yeah sure." He also stated he did not know what was in the boxes but supposed he did now. Iparraguirre also indicated that he did not know Bohne and that he had been told to drive around

until someone called and instructed him where to take the vehicle. While agents were driving the car to Bohne's house, the mobile phone rang but the caller hung up when the agent answered. Iparraguirre then explained that he had given his wife the number so she could call.

Finally, at trial Iparraguirre testified that he turned left on 14th Street because he "had to go east." Iparraguirre also testified that he was taking the car for a tune-up although he did not tell the arresting officers that or that Bohne had picked him up approximately forty-five minutes prior to his arrest. Indeed, Iparraguirre specifically testified that he only met Bohne once.

In reviewing a motion for judgment notwithstanding the verdict it is not necessary that "'the evidence exclude

every reasonable hypothesis of innocence . . . . A jury is free to choose among reasonable constructions of the evidence."' *United States v. Quintero*, 848 F.2d 154, 155 (11th Cir. 1988) (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (*en banc*), *aff'd on other grounds*, 462 U.S. 356 (1983)). Moreover, the Court must review the evidence in the light most favorable to the government, *id.*, and draw all reasonable inferences and issues of credibility in favor of the trier of fact. *Id.*

The government contends that Iparraguirre's motion should be denied because his sole possession of cocaine worth three million dollars combined with other circumstantial evidence is sufficient for a reasonable jury to infer that he knowingly participated in the conspiracy and sub-

stantive offenses. Iparraguirre attempts to distinguish the Eleventh Circuit precedent which has permitted a jury to infer knowledge and intent from the amount of cocaine involved. Iparraguirre also cites three Eleventh Circuit cases which he maintains require that the court grant the motion. The Court will first address what, if any, inference reasonably can be drawn from the quantity of cocaine found in Iparraguirre's possession.

The government contends that Iparraguirre's sole possession and control over cocaine worth three million dollars permits the inference that he was a conspirator. To support this position, the government cites *Quintero* where the Eleventh Circuit affirmed the conviction of appellant, Hector Quintero, who had loaded boxes of cocaine into a van and then drove

the van slowly to a spa while constantly checking his rear view mirror. After arriving at the spa, Quintero walked around the parking lot and entered and exited the building a number of times. He then abandoned the van and hailed a ride from a stranger to a phone even though there was a phone at the spa. Although *Quintero* maintained that he was delivering supplies to the spa for a friend who was following him, arresting agents testified that no one had followed Quintero.

In the holding that Quintero's actions and his control over the drugs adequately supported the verdict the court explained:

> We note that [the defendant] was in sole possession of a large quantity of cocaine contained in boxes. . . . "we think it reasonable for a jury to conclude that in the course of transporting or distributing millions of dollars worth of readily market-

> able [contraband drugs], through channels that wholly lack the ordinary protection of organized society, a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders."

Id. at 156 (quoting *United States v. Cruz-Valdez*, 773 F.2d 1541, 1547 (11th Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986). Thus, the government argues that Iparraguirre's exclusive control over the cocaine likewise supports an inference that he was a conspirator.

The Eleventh Circuit subsequently affirmed another drug conviction, in *United States v. Pollack*, 926 F.2d 1044 (11th Cir. 1991), based on the appellant's control over a large amount of cocaine, even though there was little other evidence of appellant's knowing participation. Citing the above language from *Cruz-Valdez*, the court held that "[a] jury reasonably could

conclude that no drug smuggler would entrust a shipment worth a million dollars to an outsider." *Id.* at 1050. The court also noted, however, that the jury could have justified its verdict on the fact that someone replaced the rental car identification with a "keep on truckin" label; the appellant told the arresting officer he was a salesman even though his wife testified he was an apprentice mechanic; the appellant said his was going to a wedding but did not have a present; the fact the defendant equipped his rental car with a CB antenna, radar detector and tools to deal "with such eventualities as flat tires quickly and independently;" and the defendant's prior drug conviction. *Id.* at 1049-50.

Although *Pollock* and *Quintero* indicate that where a defendant has exclusive

possession of a large amount of cocaine the government's burden to produce additional evidence of participation is minimal, the Court finds that after analyzing the line of cases upon which *Pollack* and *Quintero* are grounded, the facts of this case do not warrant that inference. *Quintero* and *Pollack* are merely two in a long line of cases which have descended from the Eleventh Circuit's holding in *Cruz-Valdez*. *Cruz-Valdez* and its progeny almost without exception have dealt with large amounts of cocaine aboard sea going vessels of various size. The court in *Cruz-Valdez* acknowledged that "[a]lthough the sufficiency test can . . . be satisfied by numerous kinds of evidence, we think it appropriate that our cases have given one factor—the quantity of marijuana on board a vessel—particular attention."

Id. at 1546. According to the court this emphasis was appropriate for two reasons: first, large quantities of contraband on a small vessel make it most unlikely that the persons on board will be ignorant of its purpose and; second, given the probability of detection it is improbable that smugglers would allow an outsider on board a vessel carrying contraband worth millions of dollars. Thus, the court reaffirmed its prior holdings that where the facts support these two inferences, the government's burden to prove participation is relatively light and might be satisfied by evidence of suspicious circumstances, flight, obvious contraband, or inculpatory statements.

In *United States v. Vidal-Hungria*, 794 F.2d 1503 (11th Cir. 1986), however, the court explained that the rule set

forth in *Cruz-Valdez* "is one of reason and [a court] must consider the totality of circumstances in each case to determine whether sufficient factors exist from which 'a reasonable jury could infer and find beyond a reasonable doubt knowing and intentional participation,'" *Id.* at 1513 (quoting *Cruz-Valdez* at 1545). Accordingly, the court explained that a large quantity of cocaine would not be controlling if the totality of circumstances undermined the two inferences the court permitted in *Cruz-Valdez*. Thus, the court went on to hold that knowledge could not be inferred to the entire crew where non-odorous contraband was carefully secreted in a large cargo vessel which was also carrying a large amount of legitimate cargo. Furthermore, the court held that because it was unlikely that the crew

would detect the contraband, it was also likely that the smugglers would permit strangers to be present during the transportation. Because the presumptions outlined in *Cruz-Valdez* were not supported by the totality of the evidence, the court held that the large amount of cocaine was not sufficient to infer defendant's knowing participation beyond a reasonable doubt.

Likewise, the Court believes that the totality of circumstances surrounding Iparraguirre's possession severely undermine the presumption that he must have known that the car contained contraband and that therefore smugglers would not have entrusted it to him had he not been a conspirator. The evidence is clear that Iparraguirre was only in the car with the contraband for approximately four minutes

--and was accompanied by Bohne for two of those four minutes. Moreover, there was no evidence that Iparraguirre had any contact with, or knowledge of, the known conspirators before three o'clock that afternoon--three hours before he was arrested. This is significant given the scope and duration of the government's investigation. Furthermore, the contraband was contained in sealed "Beacon Company·" moving boxes labelled with the word "Salizar" and the Spanish words for bathroom or kitchen. The boxes did not emit any odor nor otherwise indicate that they contained anything other then what they purported to contain. Accordingly, it is apparent that Iparraguirre's nexus to the vehicle and contraband is minimal compared to a member of a small crew, making an extended voyage, on a small boat, which is

carrying substantial amounts of odorous marijuana stowed in readily accessible compartments.

Consequently, the inference that the conspirators would not have entrusted the contraband to Iparraguirre is significantly diminished because the danger that he would realize he was carrying three million dollars worth of cocaine was minimal. Furthermore, any inference that the conspirators were reluctant to risk the property is somewhat undermined by the fact they previously left a van full of cocaine unattended for several hours. Regardless, unlike *Quintero*, the government produced no evidence that Iparraguirre was actually in exclusive control of the contraband and not being observed by those who engaged him. Accordingly, it is clear, as it was in *Vidal-Hungria*, that the quantity of

drugs is not controlling in light of the totality of circumstances and that, therefore, the government must demonstrate Iparraguirre's knowing participation through evidence other than his mere presence in the car containing the cocaine.

In addition to Iparraguirre's presence and control over the cocaine, the government also maintains his knowledge can be inferred from the fact that he drove evasively, made inculpatory statements at the time of his arrest and contradicted prior statements during his testimony. These facts, however, are not sufficient. In *United States v. DeSimone*, 660 F.2d 532 (11th Cir. 1981), the government established that the appellant had checked into a room rented and occupied by known conspirators and that the appellant was observed in the presence of other

known conspirators several days later. The appellant was then apprehended, along with three known conspirators, in the vicinity of a red caprice that another known conspirator had rented. The red caprice had crashed in a remote spot located in the area where the plane carrying the drugs was scheduled to land. Moreover, the appellant's fingerprints were found on a different car rented by another known conspirator who was also arrested in the vicinity of the landing zone.

In reversing the appellant's conviction, the court first acknowledged that the appellant's association with other known conspirators, his presence near the remote landing site for the purpose of unloading a marijuana laden airplane, his fingerprints, and his attempted flight, placed the defendant in a "climate of

activity" and "certainly arose suspicion." Nevertheless, the court held that the government had failed to prove beyond a reasonable doubt that appellant conspired to import marijuana because

> [o]bviously, appellant's presence was highly suspicious, but this is not a substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible -- maybe even probable -- that [the appellant] was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries "must not be permitted to convict on suspicion and innuendo."

Id. at 537 (quoting *United States v. Littrell*, 574 F.2d 828, 833 (5th Cir. 1978). In *United States v. Pintado*, 715 F.2d 1501 (11th Cir. 1983), the Eleventh Circuit cited *DeSimone* as representative of this circuit's law "that neither mere presence nor presence at the scene in conjunction with fleeing or hiding from

officers of the law alone will support a conspiracy conviction." *Id.* at 1504. The court then reversed the conviction of a defendant who was found hiding in the closet of a house into which known conspirators were transferring drugs from a boat. Judge Hill concurred stating "it is clear we are bound by *United States v. DeSimone*" even though court had modified the standard since *DeSimone*. In *United States v. Sullivan*, 763 F.2d 1215 (11th Cir. 1985), DEA agents observed the appellant in a hotel parking lot near a red van. Agents then observed another individual arrive in a blue van and walk over to the appellant. Those two then walked over to two other individuals and the group walked around the parking lot together for a few minutes. The appellant and the driver of the blue van then removed a package from

the blue van and went into the hotel lounge where they were arrested. The government also introduced evidence that appellant's specific role was to distribute the drugs. Trying to distinguish *DeSimone*, *Pintado* and other cases the government argued that it had established appellant's knowledge because he was associated with known conspirators and was entrusted by them to distribute the drugs.

The court rejected the government's distinctions holding that there was no evidence that the defendant

> knew of the existence of the conspiracy or that he knew that the van was to be used to transport marijuana . . . . His conviction seems to be based totally on his presence at the scene in the [hotel] parking lot. He was not observed doing anything from which the jury could draw an inference that he was a member of a conspiracy.

Id. at 1219.

Finally, in *United States v. Hernandez,* 896 F.2d 513 (11th Cir. 1990), the government showed that the appellant arrived in a car with cocaine in the trunk, accompanied the driver to the trunk where cocaine was removed and given to an undercover police officer. The government showed that the defendant "caught on to something", left the scene and was arrested across the street talking into a dead telephone. Moreover, the government introduced evidence of the defendant's prior conviction as evidence of intent. In reversing the conviction the court noted that

> All the facts presented involving Giral took place in the *few minutes* between arrival of Aquino's car and Giral's departure when the package was given to [the officer]. The government *offered nothing linking Giral to the confidential informant or [to any other defendants].*

> Viewing the facts in the light most favorable to the government, we can surmise that Giral's association with Aquino *may have been criminal, that Giral's presence at the scene of the crime could have been because of his involvement in the conspiracy, that Giral's abrupt departure might have occurred because he caught on to Garcia, was guilty and hoped to avoid arrest, and that Giral's intent in this case could have been identical to his intent in the narcotics crime for which he was convicted in 1985. We cannot find, however, that the government proved beyond a reasonable doubt that Giral was a member of this particular conspiracy....*

Id. at 519 (emphasis added).

These cases make clear that none of Iparraguirre's actions permit a reasonable jury to infer beyond a reasonable doubt that he knowingly participated in a conspiracy or intended to possess cocaine. Unlike the cases cited, there was no evidence that Iparraguirre had any substantial connection to the known conspirators

or to the cocaine. Indeed, the evidence of Iparraguirre's involvement with the cocaine rests on his actions over a period of only four minutes. Nor was there evidence, as in *DeSimone*, of Iparraguirre's role in the conspiracy. In fact, the only evidence on this point was that Iparraguirre was not informed that the boxes contained cocaine. Finally, Iparraguirre had no prior conviction from which the jury could infer his intent and knowledge.

Although taken in the light most favorable to the government, Iparraguirre's driving, statements, and testimony, as well as the call to the mobile phone could permit an inference that Iparraguirre was a knowing participant in the conspiracy, these facts when compared to precedent do not support an inference of guilt beyond a reasonable doubt. Thus,

because Iparraguirre's minimal nexus to the conspirators and contraband does not itself, *nor in conjunction with the other evidence*, justify an inference beyond a reasonable doubt that he knowingly participated in these crimes, there is insufficient evidence to support his conviction.

This result is not inconsistent with either *Pollock* or *Quintero*. In *Pollock* the defendant's nexus to the car and contraband was substantial. For instance, the defendant was pulled over in Georgia driving a car he had rented in Miami. Thus, the jury could reasonably infer that the defendant had been driving the car himself from Miami to Georgia. This fact was bolstered by the amount of personal clothes in the car. In addition, the defendant had tampered with the rental license plate and outfitted his rental car

with various pieces of mechanical equipment as well as a radar detector and CB antenna. Most important, the contraband was located in a place which was difficult to reach and thus was not likely to have been placed there casually or without the defendant's knowledge.

In addition to the defendants' substantial relationship to the car and contraband in *Pollock* and *Quintero*, there was also strong independent evidence that the defendants knowingly participated in the crimes. Specifically, the defendant in *Pollock* blatantly lied about his profession and apparently lied about his destination. Additionally, the jury was allowed to consider the defendant's prior drug conviction as evidence of his knowledge and intent. In *Quintero* the defendant drove to pick up the contraband, loaded

it, and drove his van slowly away from the pick-up point. Significantly, the agents testified that no one was following or observing the defendant. In addition to the quantity of drugs in his possession, the government also introduced independent evidence of the defendant's knowing participation. For instance, the agents testified that the defendant "constantly" checked his rear view mirror and drove very slowly. He then walked around for quite awhile before abandoning the van in the parking lot and getting a ride from a stranger to a phone although there was a phone back at the spa.

Thus, in both *Pollock* and *Quintero* the defendants' relationship to the vehicle and contraband, as well as, the independent indicia of their knowledge justified a strong inference that they were

aware of their cargo. In contrast, neither Iparraguirre's limited relationship to the car and contraband, nor the other indicia of his knowledge are strong enough to support an inference that he is guilty beyond a reasonable doubt.

For the foregoing reasons, it is ORDERED and ADJUDGED that Defendant Iparraguirre's Judgement of Acquittal Notwithstanding the Verdict is GRANTED.

MJS269

No. 94-1347

Supreme Court, U.S.
FILED
MAR 13 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

RAUL A. IPARRAGUIRRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

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Petitioner contends that the court of appeals erred in reversing the order of the district court granting a judgment of acquittal following a jury verdict of guilty.

1. On April 25, 1990, petitioner was indicted by a grand jury sitting in the Southern District of Florida. He was charged in two counts of an eleven-count superseding indictment with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846; and attempt to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846.

On October 8, 1992, the trial court granted a post-verdict judgment of acquittal. Pet. App. 36-63. The court concluded that, even though petitioner was

arrested while driving a car containing 196 kilograms of cocaine, "neither [his] limited relationship to the car and contraband, nor the other indicia of his knowledge are strong enough to support an inference that he is guilty beyond a reasonable doubt." Pet. App. 63.

The court of appeals reversed. Pet. App. 6-35. The court found "that the totality of [the] circumstances are sufficient to establish guilt beyond a reasonable doubt in the minds of reasonable jurors." *Id.* at 34.

2. Petitioner contends (Pet. 17-23) that the court of appeals, in finding the evidence sufficient to support his convictions, piled "inference upon inference," in derogation from this Court's admonition in *Ingram* v. *United States*, 360 U.S. 672 (1959). Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioner. After imposition of sentence by the district court, petitioner can again take an appeal to the court of appeals raising any issues that may be available to him and preserving the claim he has raised here. If the court of appeals affirms the final judgment against him, petitioner will then be able to present his present contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

MARCH 1995